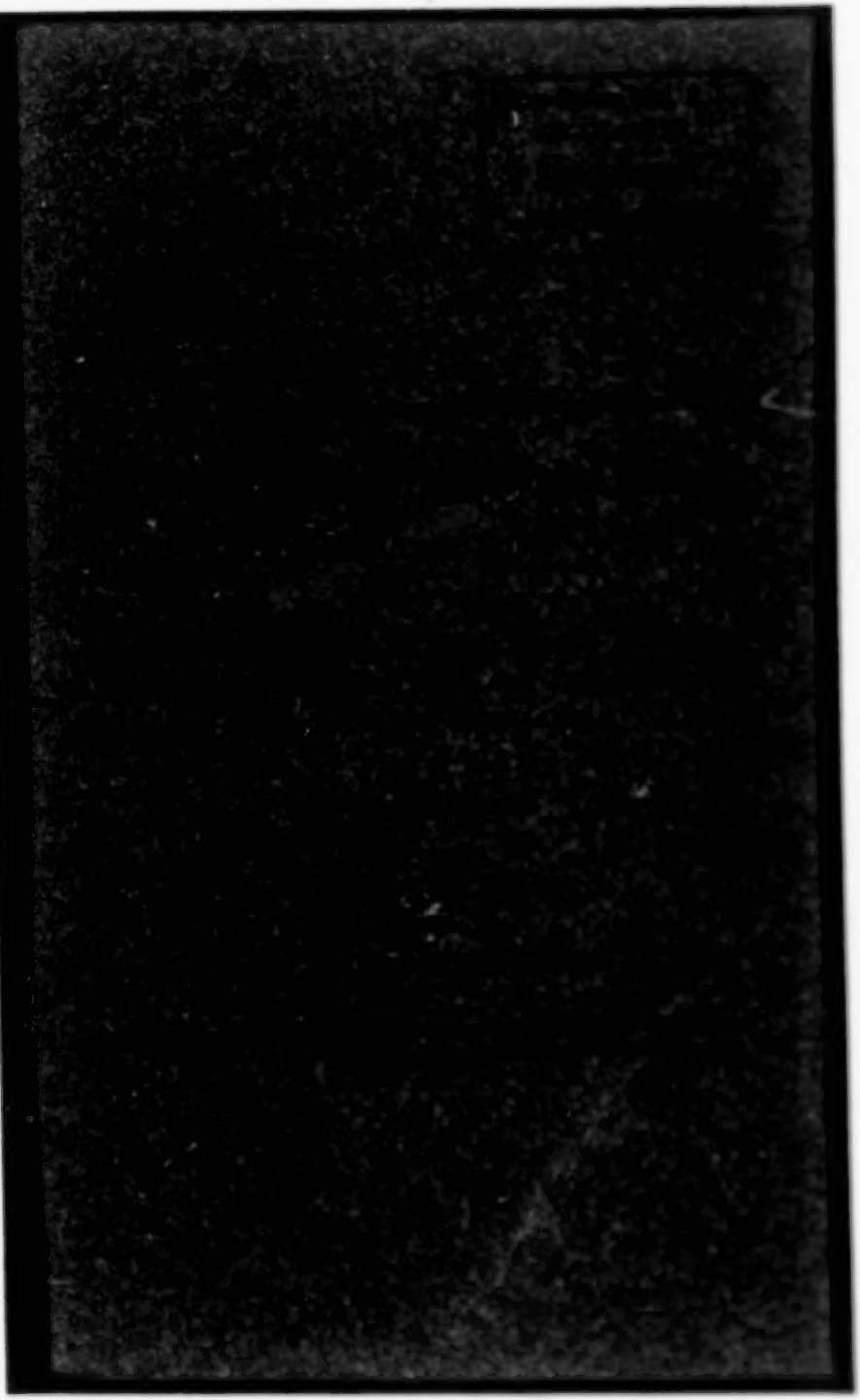

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

HENRY A. UTERHART AND EMIL HEUEL, as Trustees under the last Will and Testament of Conrad Stein, deceased, Appellants,
v.
THE UNITED STATES.
No. 214.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF CASE.

1. This suit was begun by appellants in the Court of Claims under Section 3 of the Act of June 27, 1902 (32 Stat. 406), for a refund of taxes collected under the Act of June 13, 1898 (30 Stat. 448).

That court made findings of fact (R. 24–33), and denied recovery because the estate bequeathed by the will to the legatees "was a vested estate and not a contingent beneficial interest. *Vanderbilt* v. *Eidman*, 196 U. S. 480, *United States* v. *Fidelity Trust Co.*, 222 U. S. 158."

2. The testator *died April 6, 1900,* domiciled in New York, and *his will was admitted to probate May 3, 1900,* in the Surrogate Court for the County of New York.

The will appointed his wife guardian of his minor children until they attained the age of 21; gave his wife and two sons special devises and bequests (R. 25, 26); expressed a wish that his *minor* children be supported and educated at estate expense until each attained the age of 21 years (R. 26), and then provided (R. 26):

> Eighth. *All the* rest and *residue* and remainder *of my property* real and *personal* or mixed, and wheresoever the same may be situated, *I give, devise, and bequeath unto my children* "Charlotte, Wilhelmina, Elizabeth, Josephine, Paula, Ella and Carl," *in equal shares and parts;* to them and their heirs forever.
>
> Ninth. None of my residuary *real estate* shall be sold until my youngest child attains the age of 21 years; *nor shall my executors be compelled to account until my youngest child comes of age, though they may make advances to children as in their judgment they may deem reasonable;* and may divide any surplus *rents* among legatees as they may judge proper. (Italics ours.)

He appointed his wife and others executors, and gave them power to lease and sell real estate (R. 26).

On January 16, 1902, in a suit brought in the Supreme Court of New York by one Executor against the others and all devisees and legatees, for the construction of the will, the Court, after fixing the rights of the

widow and of the special devisees and legatees, and holding that the seventh, eighth, and ninth paragraphs and particularly the provisions relating to the residuary estate were valid, decreed as follows:

> That it was the intention of the said Conrad Stein, and such is the true meaning and construction of his will, that *the whole of his residuary estate,* real *and personal, should, so far as necessary, be applied to the support and education of his minor children* "Josephine, Paula, Ella, and Carl" *during the minorities* if Carl Stein survives such period. To that end he gave, devised, and bequeathed "to his executors, and trustees" all his residuary estate both real and personal *upon trust to receive* the rents, issues and profits *and income thereof* until his son Carl Stein attains the age of 21 years, and *to apply the same to the support and education of testator's said minor children "until they respectively attain the age of 21 years,* if Carl Stein survive such period, *and on Carl Stein attaining the age of 21 years, or sooner dying, the said testator gave, devised and bequeathed the said residuary estate,* both real and *personal, to his children"* Charlotte, Wilhelmina, Elizabeth, Josephine, Paula, Ella *and Carl* "in equal shares and parts." (R. 28.) [Italics ours.]

It was further decreed that the Executors "apply" so much of the rents of realty and of the income of personalty as should be reasonable and proper to the support and education of the minor children, using the rents first (R. 28); and that they might

make advances of capital to all the children in equal shares, paying the advancements of the minor children to their guardian (R. 29). This decree will be hereafter referred to as the "New York decree."

All the children were living at testator's death and on July 1, 1902 (when Carl, the youngest, was but 11, and consequently the trust, as construed by the New York decree, had not terminated) (R. 29).

The United States claims that prior to July 1, 1902, each of the children named in the eighth paragraph of the will had an interest "absolutely vested in possession" in his or her proportionate share of the entire residuary *personal* estate.

Appellant's claim that the children had such an interest only in the amounts theretofore actually paid them by the Executors (R. 32, 33).

ARGUMENT.

I.

THIS CASE IS NOT GOVERNED BY UNITED STATES v. JONES, 236 U. S. 106, OR McCOACH v. PRATT, IBID. 562.

1. The burden of proof to establish that the interests of these legatees had "*not* become absolutely vested in possession or enjoyment prior to July 1, 1902," rests upon the claimants, not only because the original assessment established, prima facie, that these interests were "made to take effect in possession or enjoyment" (Act of June 13, 1898, Sec. 29, *Vanderbilt* v. *Eidman*, 196 U. S. at p. 493), at the death of the testator; but also because the refunding Act of June 27, 1902, placed the duty of refunding these

taxes upon the Secretary of the Treasury "upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed." This placed upon the Commissioner and, on review, the Secretary, a duty to administratively determine whether an interest was vested in possession or not within the meaning of the Act. Accordingly the claim of appellants was submitted to the Commissioner, and, as appears from their own petition, was rejected (R. 22, 23). The Commissioner held that "the tax as collected was upon * * * interests vested absolutely in possession and * * * (not) upon interests which under the terms of the will (are) were contingent as to possession."

If, therefore, any facts, as distinguished from mere rules of law, are necessary to establish that these taxed interests were not vested in possession, and the record fails to disclose such facts, the claimants must fail. Or, *e converso*, if the record facts are fairly capable of a construction which would make these interests, as matter of law, vested, they must receive that interpretation.

2. The cases of *Jones* and *Pratt*, *supra*, are capable of either of two constructions:

(*a*) As holding that an interest in a legacy of personal property is not vested in possession, either through an executor by will, or through an administrator on intestacy, until the *right* of the creditors—including everybody but legatees or distributees—*to have their claims allowed* has been shut off by the

laws of the State where the testator was domiciled at death.

(*b*) As holding that such interest is not so vested until some final distribution of the estate, by decree or otherwise, so that legatees or distributees are assured that a certain amount belongs to them free of all possible claims of others, except possibly other legatees.

While we shall maintain that appellants cannot succeed on either of these propositions, an analysis of this Court's decisions in the *Jones* and *Pratt* cases is necessary before dealing with either point.

The *Jones* case was one of administration. The intestate died June 28, 1902, and the administrator was appointed July 14, 1902. This Court, holding that the interest of the distributees was "not vested in possession" prior to July 1, 1902, said (p. 112):

> So in a practical sense their interests are contingent and uncertain until, *in due course of administration, it is ascertained* that a surplus remains after the debts and expenses are paid. *Until that is done*, it properly cannot be said that legatees or distributees are *certainly* ENTITLED *to receive or enjoy* any part of the property. The only *right* which can be said to vest in them at the time of the death is a *right to demand and receive* at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was *an ascertained surplus or residue* to which it could attach is inferable * * * from the provision

> whereby the rate of tax was made to depend upon the value of the legacy or distributive share.

On page 114 it is stated that the intestate had died only three days before July 1, 1902, and at the latter date "the debts and expenses had not been *ascertained*," " and the time had not come when the daughters were *entitled to a distribution*." [Italics ours.]

The opinion concludes that the distributees had "no *right* of *immediate* possession or enjoyment" on July 1, 1902. [Italics ours.]

The *Pratt* case involved a will and executors. The Court held that an executor and administrator stood alike under this Act. While the *Jones* case lends color to the idea that a final distribution (something *quasi in rem*, by which all claims against the estate were discharged, and the legatees got a clear bill of sale for an ascertained amount) was contemplated, the *Pratt* case, not entirely losing sight of this idea, seems to lay stress on the statutes of limitation as against creditors and the *right* given the executor by State laws as against them to turn over their legacies to the legatees. It is said as to the creditors and legatees (236 U. S. 565):

> The former had a year within which *to file their claims* and the latter were not *entitled to demand* payment of the legacies until that time expired, and then only in the event there was a residue available for the purpose. (Referring to State decisions.) [Italics ours.]

This is followed by a statement that on July 1, 1902, it was "*undetermined*" whether there would be

a residue for legacies; and, after referring to the meaning of "contingent," and "absolutely vested in possession or enjoyment" as defined in the *Vanderbilt* and *Fidelity Trust Company* cases, and pointing out that this meaning is the same for legacies as for distributive shares, the opinion thus defines the sense in which legacies are "contingent" (p. 567):

> That they come *into being* only where, in due course of administration, the debts of the deceased are *ascertained and it is found* that a surplus remains for distribution. [Italics ours.]

Again, it is stated as important (p. 567) that "*the time for presenting claims* against the estate had not expired prior to that date (July 1, 1902), and *therefore* what, if any, surplus would remain was still uncertain and the heirs were not as yet entitled to a distribution." [Italics ours.]

While it is not here necessary to claim that this Court by these decisions fixed the period of vesting as the moment when the creditors lost their right to file a claim under the various State laws, or the legatees had acquired a right as against the executor under the same laws to be paid their legacies, we nevertheless think the *Pratt* case shows a leaning that way, and this view is fortified by the fact that the old Chancery administration, as we understand it, only administered to those persons who were parties, including the creditors who came in before the Master on publication, and only affected the assets in the hands of the court. Most of the

States simply place a statute of limitations on creditors which may bar or not, according to circumstances. Such a thing as a final decree entirely discharging the executor, and distributing the estate to those rightly entitled thereto, *quasi in rem*, was, so far as we know, very rare.

It is not believed that this Court intended to hold that the State, in taxing inheritances, must wait until the executor has been entirely and completely acquitted by a final decree of distribution.

(*a*) We assume therefore that a legacy vests in possession or enjoyment whenever the time for filing claims has passed and the legatees have become entitled to their legacies under state law.

There is no evidence as to the State law in the record in the case at bar. The claimant should have produced it if it is material. Waiving this, the law of New York, where the testator was domiciled, and where his will was probated, appears to be as follows: Civil Code, § 380:

> The following actions must be commenced within the following periods, after the cause of action has accrued;
>
> § 383:
>
> Within three years;
>
> * * *
>
> 4. An action against an executor * * *.
>
> § 1819:
>
> If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or

> distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor or administrator's account is judicially settled, and not before.

Section 2718 provides for published notice to creditors at any time after the granting of letters testamentary, to present their claims within six months. If suit is brought on a claim which has not been so presented, the executor is not chargeable for any assets he may have paid in satisfaction of a legacy. Section 2718 must be read in connection with Section 1822, which provides that when any claim is rejected either before or after publication of notice, suit must be brought within six months after rejection. Section 2718a puts a further limitation on creditors, but as it was not passed till 1904 it probably has no bearing on the case at bar.

Section 2721 provides that no legacy shall be paid until after one year from the grant of letters, unless the will otherwise directs, when payment can be made on security being given. "After the expiration of one year, the executors * * * must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets."

By Section 2722 creditors may compel payment after six months from the grant of letters, and legatees after one year. By Section 2723 payment

of a legacy may be ordered within the year on security being given.

Sections 2726-2746 give a right to compel settlement of executor's accounts after one year from the grant of letters. Section 2742 makes such settlement conclusive upon all parties or privies, and Section 2743 provides for decree of distribution when the estate "is ready" therefor (*Matter of Snedeker*, 114 N. Y. Supp. 936); and the share of an infant may be paid its guardian for its support and education. (Sec. 2746.)

From these statutes it is clear that by the law of New York creditors must file claims within six months, and legatees can demand payment within a year. The record in this case discloses none of the administration, except that the testator died April 6, 1900, and his will was probated May 3, 1900. As the burden was on the appellants, it may properly be assumed (*a*) that letters issued on the day of probate (this being the ordinary practice); (*b*) that notice was immediately given creditors; that disputed claims, if any, were rejected, and no suit brought thereon within six months thereafter; that consequently the time for presentation and allowance of claims expired prior to July 1, 1902; and (*c*) that all proper claims had been paid or barred prior to that date.

If, therefore, the *Jones* and *Pratt* cases hold that a legacy vests in possession as soon as the right of the creditors to file claims is barred, and the right of a legatee to have his legacy paid has accrued, that test is fully met on the present record.

(*b*) We henceforth assume that this court held that some final order, or decree ascertaining debts, legacies, amount of the estate, and decreeing final distribution, is essential before legacies are "vested in possession."

The only New York laws suggesting such an order are sections 2726–2743. These (especially sections 2742 and 2743) *permit* such a proceeding after one year from the grant of letters. As against appellants, it must be assumed that such proceedings were had in this case and that a decree was entered transferring the residuary estate from the executors, *quasi* executors, to the same persons as trustees, prior to July 1, 1902. Apart from the dates of death and probate, the only related facts are the ruling of the Commissioner (R. 22, 23) that the testator left "a *net* personal estate of $1,768,865.85" (which figures we may assume were taken from the official appraisement under the New York Transfer Tax Act), and the finding (R. 29) that "the trust created by the said will as construed by the said decree did not terminate in whole or in part on or before said July 1, 1902." The former of these statements accords with—even if it does not demand—the conclusion that all claims against the estate had been paid, and the amount of the residuary personal estate ascertained, prior to July 1, 1902; while the latter is immaterial, as is shown by the *Fidelity Trust Company* case, *supra*. There the trust had not terminated, and yet the interest of the cestui que trust was held taxable as a whole. In this case, according to the New York

decree, the executors were also trustees. Their functions, however, in the two capacities were entirely distinct, and it is only with their functions as executors that we are now concerned. As to the latter, we are entitled to assume on this record that they had been entirely terminated prior to July 1, 1902, although their functions as trustees were still continuing.

II.

THE INTERESTS OF THE VARIOUS LEGATEES, UNDER PARAGRAPH 8 OF THE WILL, IN THE ENTIRE RESIDUARY ESTATE, LOOKED AT IN THEIR INHERENT NATURE, AND IRRESPECTIVE OF ANY QUESTION OF ADMINISTRATION, HAD "ABSOLUTELY VESTED IN POSSESSION" PRIOR TO JULY 1, 1902.

1. We admit that the United States is bound by the New York decree. By this we do not mean that the decree finally determined that the interests of the legatees under paragraph 8 of the will either were or were not "absolutely vested in possession" within the meaning of the act of June 27, 1902. We only mean that the will must be read as though it had contained the very language which that court put into its decree.

2. What interests did the legatees actually take under this decree? In this respect, as in others, the burden of proof is upon the appellants. They offered the decree as evidence, but did not offer the petition or any of the various answers, so that it can not be determined what the exact issue was; and the decree can not be interpreted in the light of that issue. If, therefore, the decree be ambiguous,

but consistent with a construction which would, according to the law laid down by this court, make the interests of the legatees "absolutely vested in possession," it must receive that construction.

3. Assuming, as we may, that the different paragraphs of the decree vary in importance from first to last, the order of importance is doubtless as follows: (*a*) the widow's dower; (*b*) the special bequests to the two sons; (*c*) the validity of the devise of the residuary real estate; (*d*) the validity of the devise of the residuary estate generally; (*e*) the use of the residuary estate for the maintenance of the minor children; (*f*) *the actual bequest of the residuary estate to the named children.* There is nothing in the record which shows that this latter subject was of more than incidental interest.

The will itself bequeathed a direct, absolute interest in the residuary *personal* estate to certain named persons. There is no contingency of any kind stated, and no other person except those named was to have any interest in the property under any circumstances. Such an absolute bequest, it is well settled, would carry income with it, and if the legatees were minors, this income, or perhaps the principal, would be paid to their guardians for their maintenance, under the New York statute, Section 2746.

The New York Supreme Court had the eighth paragraph of the will and the principles applicable to such a bequest clearly in mind, and its decree must be read accordingly; always remembering that

it was within the power of the appellants to produce evidence, if it existed, which would give the decree a clear meaning in their favor.

As the will gives a direct, absolute, bequest to named persons, the best way to approach the decree in fairness to all is to consider the respects in which it varies this direct bequest.

Generally it declares the intent of the testator that the *whole* of his residuary estate should, so far as necessary, be used for the maintenance of his minor children, *which minor children are less than the whole.* Accordingly, it gives the residuary estate to trustees (although no mention of trustees is made in the will) to receive the income; and to apply "*the same*" to the maintenance of certain named minor children, *who are less than the whole.* On the other hand, the decree provides for advancements, which are certainly income and something more, and provides that they shall be paid to *all* the children *equally.*

As to the corpus of the residuary estate, the decree is that it is bequeathed to named children, *including Carl,* "on Carl Stein attaining the age of 21 years or *sooner dying.*"

Analyzing the decree, without reference to the Revenue Acts here involved, there are but two features, which might prevent an absolute vesting of the interest, as these terms are generally understood:

(*a*) The postponement of giving the corpus of the residuary estate to the children to a period bound to occur, but uncertain in time, namely, Carl's death or attainment of 21;

(*b*) The possibility of devoting the *whole* income of the residuary estate to the maintenance of only a portion of the final beneficiaries; namely, of those only who were minors when the testator died.

These two points are closely related, and the importance of the second depends upon the first. If this Court decides that the New York decree as properly construed did not tie up the gift of the residuary estate with the period when Carl died or attained 21, but only postponed payment of an otherwise absolute gift until that period, the question of income in the meanwhile would become practically unimportant.

If, however, the decree, as this Court construes it, associated the period of Carl's death or majority with the substance of the bequest, then the question as to the income from the estate in the meanwhile at once becomes important. We submit:

(*a*) The decree, while peculiarly worded, means nothing more than that the actual *payment* of the *corpus* to the legatees shall be deferred until Carl dies or reaches majority, so that the maintenance of the minors might be cared for. This record is silent as to the circumstances which induced this litigation, and as to the questions which were puzzling the executors or the court. Appellants knew these things, and should have furnished evidence upon them, if it would have aided their case. The decree (poorly and inartificially drawn), was probably a mere consent order; *e. g.*, the fundamental question is dealt with

in this way; "he gave" "the residuary estate" "on Carl Stein attaining the age of 21 years," "*or sooner dying*" in part "to Carl Stein." Considering that the trustees are to hold the estate till Carl dies or attains majority, and meanwhile to pay its income to some only of the children, and that immediately on Carl's death or majority the trust ends—simply ends without more—and the bequest is changed into a direct one to the children, part of whom were receiving the income; and considering further that the trustees could make advancements of corpus during the minorities to *each of the children equally, and to no one else*, we claim that the New York court intended merely to put the language of the eighth paragraph of the will into a different form, not to change its substance; and meant but to protect the interests of the minor children, without in any way disturbing the direct, absolute gift to the children *nominatim*.

(*b*) Assuming that the decree, properly construed, did not give the corpus of the residuary estate until Carl died or attained majority, yet if, meantime, the income was given to the children, as individuals, and to no one else, it is well settled that the interest of the legatees is vested. This was first declared by Sir William Grant in *Hanson* v. *Graham*, 6 Vesey 239, and the rule is thus summed up by Neville, J., in *In Re Williams* (1907), 1 Ch. 180, 183:

> It is said, and I think quite accurately, that the rule is absolute that where a legacy is given at a future date accompanied by a gift of in-

> come in the meantime, the legacy vests in the legatee at once, notwithstanding the fact that he does not live until the date fixed for payment. Moreover, I think I may go one step further and say that if the whole of the income of such a legacy be given for maintenance until the time fixed for payment, that is treated as a gift of income and the legacy is vested.

He further decides that the rule is equally applicable where the gift for maintenance is of such part of the income as the trustees *see fit* to apply.

Apparently, however, this rule does not apply where the income is not given to *all* the legatees, but may be entirely distributed to certain of them only; and it is also true that the New York decree is susceptible of the construction that the *whole* income of the *entire* residuary estate might be applied by the trustees to the maintenance of the minor children alone. It is submitted, however, that such a construction is not necessary, and that such was not probably the intention of the Court. The will undoubtedly gave the *whole* of the residuary estate absolutely to *all* the children, *share and share alike*, and this bequest of course carried the income to the children *share and share alike*. To say that the income of one child could be taken from him or her and given to another child, would be to go in the very face of the will. Moreover the decree, in speaking of advancements of the corpus to the children, provides that such advancements must be to

all the children *share and share alike*, and makes *the same provision as to advancements of income*. It cannot be supposed that where income is to be used for maintenance, it may be applied indiscriminately, if when used for advancements it must be distributed, like the capital, to all the children equally. The testator's net personal estate was $1,768,865.85, and he evidently left considerable real estate. No necessity, therefore, existed for taking one child's share of the income to maintain another, and, as matter of fact, only $14,674.55 had been expended on maintenance prior to July 1, 1902 (R. 29).

The decree itself gives the corpus of the residuary estate, whether immediately or on Carl's death or majority, to the children by name, and absolutely, share and share alike. Under its terms no one else has any interest of any kind or on any contingency in the corpus. To construe it, therefore, as giving income in the meanwhile, not equally, but, *e. g.*, all to one child, would require language susceptible of no other meaning. We do not know what occasioned this litigation or what point puzzled the Court in regard to the residuary estate. *Evidently* there was a question as to the validity of the residuary devise, and *apparently*, as incidental thereto, some question as to the right to apply income of the residuary estate for the maintenance of the minor children. These seem to be the points to which the mind of the Court was really directed, and (the decree being inartificially drawn) it is fair to conclude that when the

Court spoke of "the whole of his residuary estate," and defined the trust as one to receive the income "and to apply the same" to the support of *the minor children*, it had in mind, and intended, the whole of *that portion of the income belonging to said minor children*. The question before the Court seems to have been whether the residuary bequest was valid *at all* or not, and whether the minor children were entitled to *anything* in the way of maintenance. The Court therefore used the word "whole" to combat the notion that the minors were not entitled to *anything*, but did not mean by this expression to extend one child's interest over into that of its brother or sister.

A somewhat similar case will be found in *In Re Gossling* (1903) 1 Ch. 448. The Court below (1902) 1 Ch. 945, had held that the provision for maintenance was general among the children. The Court of Appeals reversed this ruling, on a construction of a will which does not seem to have been any stronger in this respect than is the will in the case at bar, as construed by the New York decree.

4. We shall, therefore, now assume that the decree either (*a*) gave the residuary estate absolutely to the children by name, share and share alike, postponing payment merely until Carl died or reached majority; or (*b*) gave the residuary estate absolutely to the children share and share alike *when* Carl died or attained majority, meantime giving each child the income of his or her proportionate share.

In either case the authorities, without dissent, so far as we are aware, hold the interest vested. It would be pedantry to refer to more than the elementary treatises, and the Federal and New York decisions, which are as follows: Roper on Legacies, 2nd Am. ed. p. 553, *et seq.;* Jarman on Wills, 6th ed. p. 749 *et seq.;* and Mr. Bigelow's Notes on pages 794 and 796; Theobald on Wills, Canadian ed. pp. 582 to 588; *Cropley* v. *Cooper*, 19 Wall. 167, 174; *Potter* v. *Couch*, 141 U. S. 296, 313, 314, pt. 2; *Johnson* v. *Washington L. & T. Co.*, 224 U. S. 224, 237, 238, 239; *Shelton* v. *King*, 229 U. S. 90, 93, 94; *Sanford* v. *Lackland*, 2 Dillon 6, *Traver* v. *Schell*, 20 N. Y. 89, 91; *Lovett* v. *Gillender*, 35 N. Y. 617, 627, 628; *Manice* v. *Manice*, 43 N. Y. 303, 365, 368; *Warner* v. *Durant*, 76 N. Y. 133, 136; *Smith* v. *Edwards*, 88 N. Y. 92, 106; *Goebel* v. *Wolf*, 113 N. Y. 405, 413, 414; *Burrill* v. *Sheil*, 2 Barb. 457, 470; *Matter of Cojswell*, 4 Demarest 248.

5. These authorities establish that the interests of the legatees in the entire residuary estate under the eighth paragraph of the will were absolutely vested at the death of the testator according to the well-settled principles of the common law. It is true that in *Vanderbilt* v. *Eidman* this Court pointed out and held that, in interpreting the Taxing Act of 1898, or the Refunding Act of 1902, merely technical rules of the Common Law relating to the vesting of estates, and particularly of estates in remainder, must be discarded. In that case, however, there was—as there is not in the case at bar—a contingency which

might prevent the residuary estate from *ever* coming to the legatee *at all*, and the court merely contrasts a "*technically* vested interest" "where the *right* to possession or enjoyment was subordinated to an *uncertain* contingency" with an interest of which the legatee had "the *right* to immediate possession or enjoyment," the period having been reached prior to July 1, 1902, "when *possession* or enjoyment *had attached*." There is nothing in the opinion which requires us to discard the conceptions of legal possession of personal property laid down in the authorities and explained in the chapter on Possession in Judge Holmes' book on the Common Law and in Pollock and Wright's Treatise on Possession. Accordingly, in *United States* v. *Fidelity Trust Company*, it is expressly said:

> The statute does not invite speculation in a new nomenclature, or attempt to reach profounder conceptions than those familiar to the law. *When it speaks of interests absolutely vested in possession we presume that it uses familiar legal expressions in their familiar legal sense* (160). [Italics ours.]

The statute uses the words "absolutely vested in *possession or enjoyment*." There is clearly, therefore, a distinction between "possession" and "enjoyment," and if the *interest* of the legatee be *vested* in either sense it is sufficient. Now it so happens that the words "vested in interest" and "actual enjoyment" have been always used in a contrasted sense to apply to the very kind of legacy involved in the

case at bar, namely, one given to A to be paid at 21, or given to A on reaching 21, with the income in the meantime. In *Johnson* v. *Washington L. & T. Co. ubi sup.*, this Court (p. 239), after quoting with approval similar remarks from Judge Gray's opinion in *McArthur* v. *Scott*, 113 U. S. 340, 378, 380, relied upon the following remarks of the court in *Cropley* v. *Cooper, ubi sup.*:

> A bequest in the form of a direction to pay at a future period *vests in interest* immediately if the payment be postponed for the convenience of the estate or to let in some other interest * * *. In all such cases it is presumed that the testator postponed *the time of enjoyment by the ultimate legatee* for the purpose of the prior devise or bequest.

And similar language may be found in many other cases.

If, therefore, familiar legal principles based upon substantial, not technical, reasons are to be followed in construing the Refunding Act, clearly these legatees had interests vested in possession under the eighth paragraph of the will. No one else had any interest under any contingency whatsoever in either the corpus or the income thereof. If any one of the legatees had died prior to Carl's death or majority, plainly his entire share would have gone to his executor or administrator. This is neatly brought out by the provision of the decree (R. 28) that on Carl dying before reaching 21 his portion of the residuary estate shall go to himself, *i. e.*, clearly to

his executor or administrator. Unless some impossible standard of physical control of personal property is to be adopted, the interest of these legatees in the whole residuary estate must be considered to have vested in possession prior to July 1, 1902. The case is really governed by *United States* v. *Fidelity Trust Company*, *supra*.

CONCLUSION.

The judgment of the Court below should be affirmed.

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JANUARY, 1916.

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